Supreme Court, U.S.
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No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABIGAIL RUTH MARSHALL
and DONALD BERGERSON

Petitioners,

vs.

SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES;DAVID AND JOYCE OWEN; STANLEY MARSHALL; CASSANDRA MARSHALL,

Respondents,

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First District, Division Three, (Cal. App. Nos. A049823; S023606)

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do "fit" near-relatives have a constitutional preference (over a state-created foster family) for obtaining custody of a minor who has been declared a dependent child of the juvenile court?

2. If so, can the state, over objection by such relatives and the child's father, constitutionally place the minor for adoption by strangers as opposed to guardianship by relatives who would preserve family bonds?

3. When a child has been taken from a natural father solely because the father is incarcerated, does the father have a right to nominate fit near-relatives to take custody of the child so as to preserve that child's religious heritage and family bonds?

4. What are the minimum requirements of procedural due process necessary to insure that near-relatives are able to avail themselves of a legislatively expressed preference that dependent children *should* be placed with them?

TABLE OF CONTENTS

Questions Presented	i
Table of Cases and Authorities	iii
Parties	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions	2
Statement	3
Reasons for Granting Certiorari:	
Certiorari Should Be Granted to Resolve Whether Families Have the Constitutional Power to Stop The State From Placing Children With Strangers for Purposes of Adoption, Rather Than With Near-Relatives For Purposes of Preserving Cultural Heritage and Family Bonds	7

TABLE OF CASES AND AUTHORITIES

Cases

Backlund v. Barnhart 778 F.2d 1386 (9 Cir., 1985) 13
Cleveland Bd. of Educ. v. La Fleur 414 U.S. 632 (1974) 8
Drollinger v. Milligan 552 F.2d 1220 (7 Cir., 1977) 9
Drummond v. Fulton County Dept. Fam. and Children's Services 563 F.2d 1200 (5 Cir., *en banc* 1977), *cert. den.* 437 U.S. 910 13
Gibson v. Merced County Dept. Human Resources 799 F.2d 582 (9 Cir., 1986) 13
In re Aaron S. 228 Cal. App. 3d 202 (1991) 4
In re Baby D. 208 Cal. App. 3d 1489 (1989) 12
In re Jessica Z. 225 Cal. App. 3d 1489 (1990) 12
In re Terry E. 180 Cal. App. 3d 932 1986) 7
Kyees v. County Dept. Pub. Works 600 F.2d 693 (7 Cir., 1979) 13
Lipscomb ex.rel. deFehr v. Simmons 884 F.2d 1242 (9 Cir., 1989) *rhg. en banc gn'd* 907 F.2d 114 (1990) 9
Meyer v. Nebraska 262 U.S. 390 (1923) 6,9
Moore v. East Cleveland 431 U.S. 496 (1977) 6,9,13
Pierce v. Society of Sister 268 .S. 510 (1925) 6,9
Prince v. Massachusetts 321 U.S. 158 (1944) 9
Rivera v. Marcus 696 F.2d 1016 (2 Cir., 1982) 9
Sherard v. Owens 484 F.Supp. 728 (W.D., Mich., 1980) *aff'd* 644 F.2d 542, *cert. den.* 454 U.S. 828 13
Smith v. Org. of Foster Families for Educ. and Reform 431 U.S. 816 (1977) 6,7,12,13
Stanley v. Illinois 405 U.S. 645 (1972) 11
Trujillo v. Bd. of County Comm. 768 F.2d 1186(10 Cir., 1985) 9
Wilder v. Bernstein 848 F.2d 1338 (2 Cir., 1988) 9
Wisconsin v. Yoder 406 U.S. 205 (1972) 6,9

Constitutions

U.S. Constitution Amend. I 2

U.S. Constitution Amend. IV 2
U.S. Constitution Amend IX 2
U.S. Constitution Amend XIV 2

Statutes

Ca. Welf. and Institutions Code section 202(a) 9
Ca. Welf. and Institutions Code section 281.5 10
Ca. Welf. and Institutions Code section 300(g) 4
Ca. Welf. and Institutions Code section 319 10
Ca. Welf. and Institutions Code section 361.3 11
Ca. Welf. and Institutions Code section 366.25(d) 10
Ca. Welf. and Instituitons Code section 366.25(g) 4
Ca. Welf. and Institutions Code section 366.26(c) 10
Ca. Welf. and Institutions Code section 366.26(j) 4
Ca. Welf. and Institutions Code section 388 12
28 U.S.C. 1257(a) 2 2
28 U.S.C. 2043(b) 1

Authorities

Beyer and Mlyniec, "*Lifelines to Biological Parents: Their Effect on Termination of Parental Rights*," 20 Fam. L. Q. 233 7
Committtee for the Family, Group for Adv. of Psychiatry, *New Trends in Child Custody Disputes 80-81* 2 Int. J. Fam. Therapy 176 8
Davis, "*Use and Abuse of the Power to Sever Family Bonds* 12 N.Y. Rev. L. & Soc. Change 557 13
Stack, "*Cultural Perspectives on Child Welfare* 12 N.Y. Rev. L. and Soc. Change 539 7
Stolberg, "*Foster Care Rules Left Out*" *Los Angeles Times* Nov. 30, 1991 8
Symposium: *The Impact of Psychological Parenting on Child Welfare Decision-Making* 12 N.Y.Rev. L. & Soc. Change 485 12,13

No. 91-—

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABIGAIL MARSHALL, *et. al., Petitioners,*

vs.

DEPARTMENT OF SOCIAL SERVICES, *et. al., Respondents,*

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal of California,
First Appellate District, Division Three

PARTIES

The parties to the proceeding in the appellate and Supreme Courts of California were petitioners, Abigail Marshall and Donald Bergerson, the paternal aunt and uncle of Cassandra Marshall; Stanley Marshall, Cassandra's father; Cassandra; the San Francisco Department of Social Services, which has custody of Cassandra; and Joyce and David Owen, the state foster family with whom Cassandra has been placed.[1]

OPINIONS BELOW

The decision of the Court of Appeal is annexed as App. 1. The order by the Supreme Court of California denying discretionary review is annexed as App. 2.

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1. The foster family filed no brief in the appellate court, but was listed by that court as a party to its decision, and hence is a respondent here. Also, while Cassandra's *mother* was not a party to the appellate decision, she has been served with copies of this petition. Finally, 28 U.S.C. 2403(b) may apply hereto, and service has been made on the Attorney General of California.

JURISDICTION

On December 18, 1991, the California Supreme Court entered an order denying review and thereby affirming a judgment which, as appears, poses a substantial Federal question. Jurisdiction is conferred on this Court pursuant to *28 U.S.C. 1257(a).*

CONSTITUTIONAL PROVISISIONS

Petitioners rely on the following constitutional provisions:

1. The *First Amendment* to the Constitution, which provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The *Fourth Amendment* to the Constitution, which provides that "[t]he right ot the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

3. The *Ninth Amendment* to the Constitution, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. The *Fourteenth Amendment* to the Constitution, which provides that "(1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ...."

STATEMENT

This is an appeal from denial of a motion by petitioners to obtain custody of their niece, Cassandra Marshall.

Cassandra was born in September of 1988 to a drug-addicted mother and an incarcerated father. Neither of Cassandra's parents could care for her, but her father *arranged* for her care by asking his sister and her husband, petitioners here, to raise Cassandra on his behalf. Petitioners agreed to do so. They did not seek financial compensation, but rather hoped that their commitment would allow Cassandra to preserve loving ties to her natural family and to be exposed to the Jewish religion to which petitioners and Cassandra's father adhere. (Tr. 404; App. 1 at pages 3-4)

However, the local Department of Social Services had plans of its own. The Department detained Cassandra at birth and placed her in a series of two foster homes a considerable distance from petitioners' home. Both foster care providers were unrelated to Cassandra and took her (and other children) into their homes on a temporary basis, for money. (Tr. IV:62-63) Although placement in foster care was initially justified by the Department as related to Cassandra's health,--(Cassandra had withdrawal symptoms at birth and the foster placements were with nurses),--the social worker admitted at trial that she "dragg[ed her] feet" (Tr. 110) in moving Cassandra long after the child had recovered from any possible illness.

Around the time that it detained her, the Department filed a petition to have Cassandra made a "dependent" of the juvenile court. A finding of dependency is a condition precedent under California law for the eventual termination of the rights of unfit parents and the placing of a child for adoption. Cassandra's father objected to the finding of dependency, protesting that his sister and her husband were available to take the child (which need not thus become a ward of the court). His objection was overruled; dependency was declared; and Cassandra

remained in foster care.[2] (Tr. 9-10; App. 1 at page 10)

During the ensuing year, petitioners repeated their request to raise Cassandra. (*E.g.*, App. 1 at pages 4-5) The Department conceded that petitioners could provide Cassandra with a "fit" home,--(an inevitable concession in that petitioners are both licensed attorneys; own a house; have been married for ten years; and have two healthy children),--but the Department never got around to making the move. The Department *did* initiate overnight "preplacement" visits between Cassandra and her relatives, (which raised "no noticiable concerns" (Tr. 64) on part of the social worker assigned to the case), but the move *still* did not occur.

California law requires that a permanent home be found for a dependent child after twelve (or, at most, eighteen) months, and the preference is for keeping the child in the present foster placement if he or she has been there for any substantial period of time. *California Welfare and Institutions Code section 366.25(g); see,* also, *section 366.26(j).* Lest Cassandra remain in foster placement by default, petitioners filed a petition requesting that the juvenile court *order* Cassandra moved to their home.

Meanwhile, the relationship between the foster family and petitioners deteriorated. Petitioners, who had sought custody of Cassandra for *inter alia,* the purpose of raising her in the Jewish faith, were alarmed when the foster mother "dedicated" Cassandra to be raised in the Penatcostal sect to which the foster family belonged, and told petitioners it was important that Cassandra be raised in a "good Christian home." (Tr. 413-414, 812, 831, VI:

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2. *After* the above-referenced hearing in the instant case, the law in California changed. Under the amended law, the juvenile court could not establish jurisdiction over a child such as Cassandra solely on grounds that the father was incarcerated. *In re Aaron S.* 228 Cal. App. 3d 202, 278 Cal. Rptr. 861 (1991); *California Welfare and Institutions Code section 300(g),* effective January 1, 1989.

83-86) The foster family later expressed personal distaste for petitioners (Tr. 811, 815, 842) and resisted visitation between them and Cassandra. Ultimately, the foster family announced its decision to adopt Cassandra.

The Department opposed petitioners' request for custody. The Department relied primarily on testimony from a psychologist who was of the opinion that the foster parents were Cassandra's "psychological parents" from whose home it would be damaging to move a child of eighteen months of age after a year of residence. (Tr. 263, 272-277, 282, 288-292, 297-299; App. 1 at pages 5-6) In addition, the Department's social worker claimed that on several occasions petitioners had equivocated in their demands for custody and had explored placing Cassandra in homes other than theirs. Petitioners' witnesses attested to the consistency of petitioners' custody requests, and their psychiatrist testified that the Department's "psychological parenting" theory was not scientifically valid. (Tr. 379-504, 602-762, 795-865; Tr. V; App. 1 at page 6)

Petitioners lost their case in the trial court. California law has no substantive presumption favoring placement of a dependent minor with near-relatives. Relatives must petition the court like any other claimant and prove it is in the minor's "best interest" to live with them; because relatives lack a substantive "preference," should the Department favor an alternative custodian, the relatives must show that there is something *wrong* with the Department's choice before they can satisfy the burden of showing that *they* are "best." By the time that the petition was finally heard, this was too heavy a burden for petitioners to shoulder.

At *all* stages of these proceedings[3], petitioners

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3. Petitioners filed a lengthy constitutional brief in the trial court, (R. II), and their appeal briefs were predicated almost entirely on Federal Constitutional analysis, as was their petition for review in the State Supreme Court.

maintained that they had a custodial preference as a matter of Constitutional law. The Constitution protects extended family units, [*Moore v. East Cleveland* 431 U.S. 496 (1977)], and family-based religious traditions, [*Wisconsin v. Yoder* 406 U.S. 205 (1972)], from unwarranted intrusion by the state. Moreover, *parents* have a right to direct, through surrogates if necessary, the upbringing of their children in a chosen way, [*Meyer v. Nebraska* 262 U.S. 390 (1923); *Pierce v. Society of Sisters* 268 U.S. 510 (1925)], and Cassandra's father had nominated petitioners as his surrogates here. By contrast, the rights, *if any,* of state-created foster families are far more limited than those originating with biological ties. *Smith v. Organization of Foster Families for Education and Reform* (hereafter "*Smith v. O.F.F.E.R.*") 431 U.S. 816, 844, 846-847 (1977). Combining these concordant strains of constitutional doctrine, petitioners reasoned that "fit" near-relatives have a preference over state-created foster families for custody of dependent minors.

The trial court rejected petitioners' constitutional arguments without comment.[4] The judgment of the trial court was affirmed on appeal; although it noted at oral argument that this case epitomized numerous similar tragedies, the appellate court held that relatives "have no constitutional claim giving them preferential rights to" a dependent minor, (App. 1 at page 15), and that the state can, for no particular reason, permissibly delay relative-placement from birth through permanency planning, at which point [t]he fact that ... [the state] had the opportunity, at a previous time, to place the minor with relatives becomes irrelevant." (App. 1 at page 17). The California Supreme Court, without comment, refused to hear the case. (App. 2) This petition followed.

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4. The trial court commented only on the *statutory* preference which, it held, did not apply because the court intended to order an adoption, at which point the foster parents, as current caregivers, would have a preference.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER FAMILIES HAVE THE CONSTITUTIONAL POWER TO STOP THE STATE FROM PLACING CHILDREN WITH STRANGERS FOR PURPOSES OF ADOPTION, RATHER THAN WITH NEAR-RELATIVES FOR PURPOSES OF PRESERVING CULTURAL HERITAGE AND FAMILY BONDS

It is common knowledge that the number of neglected or abandoned children is growing. The epidemic of drug dependency and a generation of economic stagnation has strained the bonds of families already weakened by a generalized loosening of moral restraints and an enervating dependency on welfare.

Unfortunately, neglected children sometimes suffer additional blows from the system which is chartered to protect them. One common source of such harm is the "deep antifamily bias," [Beyer and Mlyniec, "*Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence,*" 20 Fam. L. Q. 233, 239 (1986)], held by "social workers of middle class backgrounds [who], perhaps unconsciously, incline to favor ... placement [of dependent children] in foster care with a generally higher-status family rather than return the child to his natural family." *Smith v. O.F.F.E.R., supra,* 431 U.S. at 834; Stack, "*Cultural Perspectives on Child Welfare,*" 12 N.Y. Rev. L. and Soc. Change 539, 545 (1984). As a result of this "'mind set' to place ... children for adoption [with non-relatives] as soon as possible," [*In re Terry E.* 180 Cal. App. 3d 932, 946, 225 Cal. Rptr. 803 (1986)], children are placed with strangers who are often jealous of and hostile towards the child's *biological* family. When, as here, near-relatives would, *themselves,* have been willing to raise the child, the consequences are tragic; not only are the relatives denied the opportunity to repair bonds of kinship strained by whatever it was that caused the child's parents to neglect her in the first

place, but the *child* is denied an opportunity to nurture a self-image based on a concept of *intrinsic* biological worth.[5]

Whatever its cause and ultimate impact, the tendency to place dependent children with non-relative foster care providers as opposed to "fit" and interested relatives is constitutionally impermissible.

Near-relatives enjoy a due-process right (against the state) to configure an "extended family," and parents enjoy First and Fourteenth Amendment freedom to direct the upbringing of their young; both the parents and relatives enjoy a Fourth Amendment protection against unwarranted seizures of kin. When these rights coalesce, as here, in an absent parent's request that his child be raised by relatives so as to preserve family ties and religious heritage, the state has no legitimate power to intrude, as appears more fully below.

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"[F]reedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. La Fleur* 414 U.S. 632, 639-640 (1974). There is a protected "private realm of family life which the state cannot enter." *Prince v. Massachusetts* 321

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5. Such loss of self-esteem is never trivial, [*see, e.g.*, Committee on the Family, Group for the Advancement of Psychiatry, *New Trends in Child Custody Disputes 80-81*" 2 Int. J. Fam. Therapy 176 (1980)], but sometimes the tragedy of non-relative placement is even more tangible, such as in the case of the foster child who was beaten to death by foster parents after his aunt was denied placement. Stolberg, "*Foster Care Rules Left Out Family, Tragedy Followed; Boy's Death Raises Issue of 'Kinshp Care' as Alternative to Placing Neglected Youngsters With Strangers,*" *Los Angeles Times* Saturday, November 30, 1991.

U.S. 158, 166 (1944). This protection does not extend merely to traditional nuclear families; equally protected is the practice born "[o]ut of choice, necessity, or a sense of family responsibility, ... for close relatives to draw together and participate in the duties and the satisfactions of a common home .... [T]he choice of relatives of this degree of kinship to live together cannot lightly be denied by the state." *Moore v. City of East Cleveland, supra,* 431 U.S. at 505-506. Although *Moore* was a zoning case, the right described by it is not restricted to the context of zoning disputes. Rather, the "extended family" rights recognized in *Moore* have been recognized in a variety of contexts in the federal courts, including dependency law. *Rivera v. Marcus* 696 F.2d 1016, 1022 (2 Cir., 1982); *see, Drollinger v. Milligan* 552 F.2d 1220, 1226-1227, fn. 6 (7 Cir., 1977); *Trujillo v. Board of County Commissioners* 768 F.2d 1186, 1189 (10 Cir., 1985); *see,* also, *Lipscomb ex. rel. deFehr v. Simmons* 884 F.2d 1242 (9 Cir., 1989), rhg. *en banc.,* gn't., 907 F.2d 114 (1990). These progeny of *Moore* recognize that the right to *configure* an extended family is fundamental, *i.e.,* any restriction on it cannot stand unless supported by a compelling state need. *Moore, supra,* 431 U.S. at 506.

As indicated, *Moore* is complemented by the doctrine that *parents* have the right to make fundamental religious and educational choices on behalf of their young children. *Wisconsin v. Yoder, supra,* 406 U.S. 205; *Meyer v. Nebraska, supra,* 262 U.S. 390; *Pierce v. Society of Sisters, supra,* 268 U.S. 510. This parental right does not evaporate merely because the child is a temporary dependent of the juvenile court; the state is *still* under a duty to make reasonable efforts to provide a home with values as nearly equivlant to those of the parental home as possible. *See, Wilder v. Bernstein* 848 F.2d 1338, 1348 (2 Cir., 1988); *California Welfare and Institutions Code section 202(a).* Here, Cassandra's father sought to exercise his right to direct the upbringing of his daughter by requesting that she be placed in the home of his sister; his request gained added constitutional luster because one *reason* for it was his desire that Cassandra be raised according to his religious beliefs. The state bears a heavy "burden of justification" when seeking to impair or

impede a choice of this nature.

Concededly the state *has* a compelling interest in protecting the well-being of minor children, but that interest does not encompass the *invention* by the state of artificial "families" charged with the mission of "fostering" children whose biological kin are perfectly willing and able to nurture such children on their own. Yet California law does just that.

California works its mischief in three ways.

First, under California law, *adoption,* even if by strangers, is statutorily preferred to "guardianship," even if by near-relatives, [*California Welfare and Institutions Code sections 366.25(d); 366.26(c)*]; relative-placement tends to frustrate this normative goal since the whole *point* of placing a child with relatives is to *preserve,* rather than to sever family ties. The result is that California's statutory scheme is, at least in part, at odds with notions of relative-placement.

Second, although California statutes [6] obligate

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6. *California Welfare and Institutions Code section 281.5* provides that "[i]f a probation officer determines to recommend to the court that a minor alleged to come within Section 300, 601, or 602 should be removed from the physical custody of his parent or guardian the probation officer shall *give primary consideration* to recommending to the court that the minor be placed with a relative of the minor, if such placement is in the best interests of the minor and will be conducive to reunification of the family." (emph. added).

Welfare and Institutions Code section 319 provides that at a hearing into the initial *detention* of the minor, the court shall, *inter alia,* "determine if there is a relative who is able and willing to care for the child .... [T]he court may order that the minor shall be placed in the suitable home of a relative or in an emergency shelter or other suitable licensed place or a place exempt from licensure designated by the juvenile court or in an appropriate certified family home whose license is pending and

social workers to *investigate* placing children with relatives, the statutes confer no substantive rights in relatives, and are directory rather than mandatory even for *social workers.* Moreover, the statutes set out neither a timeframe for the processing of placement requests, nor a mechanism to enforce them. It is well recognized that there is a *procedural* component to any constitutional right to claim custody of a child, without which the bare "right" to custody is worthless. *E.g., Stanley v. Illinois* 405 U.S. 645 (1972). California's ostensible "preference" for relative-placement lacks this procedural component. Relatives must *petition* for placement, which requires them to shoulder the burden of proving that the change

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...Continued...

all the prelicense requirements for such placement have been met as set forth in subdivision (e) of Section 361.2 for a period not to exceed 15 judicial days."

Welfare and Institutions Code section 361.3 provides that "(a) In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. In determining whether such a placement is appropriate, the probation officer and court shall consider the ability of the relative to provide a secure and stable environment for the child. Factors to be considered in that assessment include, but are not limited to, the good moral character of the relative; the ability of the relative to exercise proper and effective care and control of the child; the ability of the relative to provide a home and the necessities of life for the child; which relative is most likely to protect the child from his or her parents; which relative is most likely to facilitate visitation with the child's other relatives and to facilitate refunification efforts with the parents; and the best interests of the child .... (c) For purposes of this section: (1) "Preferential consideration" means that the relative seeking placement shall be the first placement to be considered and investigated. (2)"Relative" means an adult who is a grandparent, aunt, uncle, or sibling."

of placement is in the child's "best interests." *California Welfare and Institutions Code section 388.* Requiring relatives to *initiate* action and placing the burden of proof upon them inverts basic Constitutional requirements; it ought to be the *Department's* burden to prove relative-claimants "unfit." As a practical matter, few relatives will have the resources to mount such a petition, and fewer still will be able to meet, in the context of a change-of-placement petition, the vague requirements of satisfying the "best interest" test over the objection of "trained" social work professionals.

Finally, California has come to rely on the "psychological parenting" theory, *i.e.,* that the need of children for "permanency" necessitates that they *remain* where they have initially been placed if the placement has endured for more than a short period of time. Reliance on this theory is pervasive; it is even applied at stages of proceedings when no statute lists it as a criterion for placement of a child. E.g., *In re Baby Girl D.* 208 Cal. App. 3d 1489, 257 Cal. Rptr. 1 (1989)[7]. California courts preserve a *status quo* of foster care even in cases, such as the instant one, where relatives *promptly* and repeatedly claim custody of a dependent infant. *See, e.g., In re Jessica Z.* 225 Cal. App. 3d 1089, 275 Cal. Rptr. 323 (1990).

Unfortunately, the California experience appears to be typical rather than unique. A retiring New York family court judge, commenting on the law in *her* state, observed that "[p]ressures to seek continuity via adoption after a year or two in care combine with the natural inclinations of agency workers to identify with and work more closely with foster and pre-adoptive families, who are

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7. This petition is not the place to debate the merits of "psychological parenting" theory. Suffice it to say that it is highly controversial within the psychological community. *See,* gen., Symposium: *The Impact of Psychological Parenting on Child Welfare Decision-Making* 12 N.Y.Rev. L. and Soc. Change 485 *et. seq.;* (1984); *Smith v. O.F.F.E.R., supra,* 431 U.S. at 844, fn. 52.

chosen by agency personnel and are likelier to conform to the value system of agency workers. This leads child care agencies to be neutral or indifferent with respect to the biological family when strong agency support might lead to family reunification." Davis, *Use and Abuse of the Power to Sever Family Bonds* 12 N.Y. Rev. L. and Soc. Change 557, 567 (1984). Other commentary, [*see,* gen., *Symposium, supra,* 12 N.Y. Rev. L. and Soc. Change at 485], confirms that the California and New York experience is a nearly universal one.

This ought not to be. A decade ago, this Court rejected the notion that state-created foster families enjoy constitutionally protected "liberty" interests equal to those of parents or extended families. *Smith v. O.F.F.E.R., supra,* 431 U.S. 816; *see,* also, *Sherrard v. Owens* 484 F. Supp. 728 (W.D., Mich., 1980), *aff'd.,* 644 F.2d 542, *cert. den.,* 454 U.S. 828; *Kyees v. County Department of Public Works* 600 F.2d 693, 695 (7 Cir., 1979); *Drummond v. Fulton County Department of Family and Children's Services* 563 F.2d 1200, 1207, *cert. den.,* 437 U.S. 910 (5 Cir., *en banc.,* 1977); *Gibson v. Merced County Department of Human Resources* 799 F.2d 582 (9 Cir., 1986); *Backlund v. Barnhart* 778 F.2d 1386, 1389 (9 Cir., 1985). *O.F.F.E.R.* was decided at almost the same time as this Court *also* ruled that "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history," [*Moore v. East Cleveland, supra,* 431 U.S. at 505], required the extension of Federal Constitutional protection to extended families.

In no context do the rights of families matter more than in dependency-and-termination cases. Nowhere else are the consequences so final; the state so intrusive; or the march of events so rapid. If the rights of families are not clarified in the dependency context, they surely will be overlooked; for it is clear that, in dependency cases, the state has little time for families, and families have little power to command the attention of the state.

The instant case is illustrative. The Department had no reason to detain Cassandra from "fit" relatives in the first place, and it *certainly* had no grounds to delay returning the child to her family until the rights of the family were finally allowed to flicker out. Arguably, this

case may not be entirely typical, since this aggrieved family was unusually "fit" and asked for its child early and often. But in a broader sense it is all *too* typical. As indicated, the misuse of power by the state of California is not unique. Countless families throughout the nation are similarly afflicted, and the pain that *each* family experiences is surely awesome.

Petitioners seek certiorari so that this Court can clarify the substantive and procedural rights of near-relatives in dependency cases. Petitioners ask this Court to hold that such relatives, if "fit" to assume responsibility, have a constitutional preference for the custody of kin whose parents are unavailable to care for them. Such a preference cannot, of course, be asserted to the derogation of parents[8], but it ought to be durable against capricious decisions by social services departments who would deny custody to deserving blood-relations. Petitioners are not asking for social engineering; they are merely seeking clarification of a right older than the Constitution and interwoven in its every line.

The California Court of Appeal held here, that the state can, for no particular reason (and certainly not for a *compelling* one), permissibly delay relative-placement from birth through the conclusion of a dependency case, at which point "[t]he fact that ... [the state] had the opportunity at a previous time, to place the minor with relatives becomes irrelevant." This ruling stands the Constitution on its head. If such tragedies are to be avoided, the rights of extended families must be recognized and clarified so that the state cannot, as here, blithely wound them at

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8. For example, relatives have no right to request that a child be moved far from the parents, thereby interfering with the ability of the parents ultimately to reclaim their offspring, merely to insure that relatives get a chance at custody.

their core.

DATED: February __, 1992

Respectfully Submitted:

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Appendix One:

OPINION OF THE COURT OF APPEAL

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"NOT TO BE PUBLISHED IN OFFICIAL REPORTS"

COURT OF APPEAL
FILED:
September 27, 1991

No. A049823; S.F. No. 505770

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

In re CASSANDRA M., a Person Coming under the Juvenile Court Law;

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CITY AND COUNTY OF SAN FRANCICSO DEPARTMENT OF SOCIAL SERVICES,
Plaintiff and Respondent,
v.
STANLEY M.,
Defendant and Appellant,
ABIGAIL M., et. al.,
Appellants,
JOYCE O., et. al.,
Respondents,

_____/

In re:
CASSANDRA M., No. A053099
On Habeas Corpus.

_____/

Stanley M., Abigail M., and Donald B. appeal from

a juvenile court order denying the Welfare and Institutions Code section 388[1] petition to place Cassandra M. in the home of Abigail M. and Donald B., adopting a permanent plan of adoption for Cassandra M., and authorizing the initiation of an action to declare the minor permanently free from parental control pursuant to Civil Code section 232.[2] Stanley M. has also filed a petition for writ of habeas corpus alleging ineffective assistance of counsel at the jurisdictional hearing. We ordered that the writ petition be consolidated with the appeal for purposes of oral argument.

FACTS

Although the record is replete with conflicting evidence, this court is bound by the established rule of appellate review that all factual matters will be viewed most favorably to the prevailing party. (*Nestle v. City of Santa Monica* (1972) 6 Cal. 3d 920, 925-926; *In re Albert*

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1. All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2. Although the trial court's order is nonappealable [section 366.25, subd. (j), we may treat the appeal as an extraordinary writ. (*In re Albert B.* (1989) 215 Cal. App. 3d 361, 371-373.)

We also reject the claim of Cassandra M.'s counsel that Abigail M. and Donald B. have no standing to appeal, since they are not "aggrieved" parties. It is imprudent to leave entirely to court-appointed counsel the choices that foster children are unable to make for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the child should at least be heard. (See, *Smith v. Organization of Foster Families* (1977) 431 U.S. 826, 84, fn 44 [foster parents have standing].)

B., supra, 215 Cal. App. 3d at p. 375.) With this standard in mind, the following appear to be the pertinent facts.

Cassandra M. was born on September 3, 1988. At the time of her birth, her mother, Teresa S., was addicted to drugs and her father, Stanley M., was incarcerated in Illinois on a drug charge. Abigail M. is Cassandra's paternal aunt. She is married to Donald B. Although they both expressed interest in taking Cassandra, relative placement was initially considered inappropriate because of the infant's medical condition. Consequently, Cassandra was placed in the fragile infant special care program.

Cassandra was placed in the home of Evonne Eldridge when she was three weeks old. When she was approximately three months old she was moved to the home of Joyce and Dave O. At that time, Cassandra was still exhibiting signs of withdrawal. Cassandra, who has remained with Joyce and Dave, is now a normal child, with adequate verbal skills. She considers Joyce and Dave her mother and father. She also has three siblings.

According to Abigail's testimony, she first visited Cassandra within a day after she was born. Although Abigail indicated that she was opposed to foster care, she was told that because of Cassandra's medical needs it was important she be placed in a special mom's program where specially trained people could care for the child. The initial social worker also informed her that the placement was temporary, the moms in the program were not interested in adopting the babies and the children wouid be released between six to nine months when they were well. Abigail was led to believe that any attempt to oppose foster care would be fruitless.

Abigail visited Cassandra three or four times while the infant was living in Evonne Eldridge's home. When she was informed that Cassandra was being moved to another home, Abigail asked whether the baby could be placed in her home, but was told Cassandra still required specialized care. Although the home of Joyce and Dave was twice as far away as the first foster home, Abigail and Donald visited the minor once a month or once every five weeks. The couple wanted Cassandra to be placed in their home as soon as she was legally and medically eligi

ble.

On May 18, 1989, Abigail went to court expecting to attend a hearing. She believed the hearing concerned Teresa S.'s reunification efforts and she could express her interest in having Cassandra placed in her home at that time. A court officer informed her that the hearing had been continued. When she called the court officer the following day, he told her that Cassandra's placement would not be considered until the permanency planning hearing which would not be set for six months.[3]

Abigail took Cassandra to see Stanley in Illinois in July 1989. Stanley wanted Cassandra to be placed with Abigail and Donald. He was also concerned that his daughter be placed in a home where she could be exposed to Judaism, since his family is Jewish.[4]

In the late summer of 1989, Abigail spoke with Joyce about Cassandra's adoption. Although she was thinking about adopting Cassandra, Joyce was concerned about her age, the fact that her two natural children were almost grown and financial matters. Abigail was not opposed to the idea of the adoption by Joyce and Dave at that time. In October of 1989, Joyce advised Abigail that she had decided not to adopt Cassandra.

On November 8, Abigail met with Geraldine Dito-Peavey, the child welfare worker, to discuss Cassandra's placement. Abigail was not sure whether the best way to proceed was adoption or guardianship; she was concerned about Cassandra's inheritance rights to her father's and grandfather's estates, whether Abigail could

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3. On May 19, 1988, the social worker filed a status report indicating that Teresa S. had refused to comply with her reunification plan. Consequently, it was recommended Cassandra remain in out-of-home placement and a permanency planning hearing be held in November 1989.

4. Teresa S. is Catholic

obtain support payments from Stanley, and whether there would sibling rivalry between her daughter and Cassandra. Abigail also informed Dito-Peavey that if Joyce and Dave were definitely not interested in adoption and placement did not work out with Abigail and Donald, her friend, Carla Garrett, might be interested in adopting Cassandra.

However, on December 18, after Cassandra had spent time in their home, Abigail told Dito-Peavey she would definitely take Cassandra. Abigail was still concerned whether she should adopt or become the girl's guardian. Although there is a statutory preference for adoption, Dito-Peavey agreed there were strong reasons in this case for guardianship. That same week, Dito-Peavey told Abigail that Joyce and Dave had changed their minds and wanted to adopt Cassandra. Abigail informed the social worker she was adamantly opposed to an adoption by the foster parents and that she wanted the child.

Because the tension and hostilities between the parties were increasing, and because Joyce reported that the baby was reacting adversely to the visits, Dito-Peavey terminated Cassandra's overnight visits with Abigail and Donald. She felt that a tug-of-war and the routine shuttling around were not good for the minor.

When both the foster family and the relatives expressed their desire to adopt Cassandra, Dito-Peavey decided she needed an evaluation of the case. She contacted Dr. Toni Vaughn Heineman, gave her a brief overview of the case and indicated that she needed a recommendation. Dr. Heineman's report was essentially what led to Dito-Peavey's recommendation that Cassandra should be placed with Joyce and Dave.

Dr. Heineman, a clinical psychologist, saw Cassandra on three different occasions. At her foster home Cassandra was bouncy and bubbling. She related to Joyce and Dave as her parents. In contrast, she was more subdued and tentative at the home of her aunt and uncle. Dr. Heineman opined it would be very detrimental to remove the child from her foster home and place her

with Abigail and Donald. If she were not permitted to maintain her primary relationship with Joyce, she would be devastated and confused; this could affect her future relationships.

Dr. William Schwartzman, a psychiatrist, testified on behalf of Abigail and Donald. Although he had never met with Cassandra, he had reviewed the reports made by Dr. Heineman and Dito-Peavey. Dr. Schwartzman opined that if the attachment Cassandra presently had to her foster parents were broken, the child would not have any problems forming new attachments. He stated there were not prospective studies which showed that a child removed from a parent at 18 months would suffer long-term depression.

Based on this evidence, the trial court made the following findings: "None of the parties have offered any evidence that would compel the Court to make findings that the child can be returned to the parents and that reunification can be achieved within the next six months or within 18 months from removal.

"However, there is a dispute as to whether the child should be freed for adoption through a filing of a petition pursuant to Civil Code Section 232 and there is a dispute as to whether adoption is [an] appropriate plan or whether some other plan should be ordered by the Court. And there is a dispute as to where the child should be placed.

"The findings and orders of this Court are based upon the following findings of fact and conclusions of law[:] contrary to the relatives' assertion, they did not unequivocally present themselves as a placement for the child until December 1989.

"They presented themselves as possible placements, they expressed an interest in being a placement at some future time, they explored the possibility of accepting placement but they never unequivocally said they wanted the Department of Social Services to place the child with them until December 1989.

"In the meantime, the child was in the home of Joyce and Dave [O.] and during that time that Cassie was in their custody, they provided her with the physical and

psychological nurturing of parents.

"It's important to note that Abigail [M.] and Donald [B.] continued to explore placement for Cassie to include themselves and Carla Garrett through the end of Decmeber as they encouraged and cooperated and shared custody of Cassie during that month.

"And, again, it must be noted that Cassie remained in custody of the foster parents who, despite indecision about whether they would provide long-term adoptive care for Cassie, continued to provide her with the physical and psychological nurturing of parents."

The Court determined that Dr. Heineman's testimony was credible and persuasive, whereas Dr. Schwartzman's was unpersuasive. It also found that Cassandra had substantial emotional and psychological ties to Joyce and David, and it would be seriously detimental to remove her from the foster parents.

The court then ordered the dependency status renewed on behalf of the minor, that she remain in the care and custody of the Department of Social Services, that the permanent plan is adoption, that the city attorney initiate an action to declare Cassandra permanetly free from parental control pursuant to Civil Code section 232 adn that she be placed with the foster parents.

DISCUSSION

Motion to Terminate Dependency

The petition for dependency in this case was filed on September 16, 1988, pursuant to former section 300.[5]

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5. Former section 300 provided in relevant part: "Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court: (a) Who is in need of proper and effective parental care or control and who has

The only jurisdictional fact alleged as to the father was that he was incarcerated. At the December 1, 1988, jurisdictional hearing, Stanley M.'s attorney informed the court that his client was incarcerated, that he had a trial date set for February 1989, and that he did not want to admit the allegations. The court found a continuance would not be in the best interests of Cassandra and the allegation of incarceration was true; it then committed Cassandra to the care and custody of the Department of Social Services.

On January 1, 1989, section 300, subdivision (g) become operative. That subdivision provides in pertinent part that the juvenile court may adjudge any minor a dependent when "the minor's parent has been incarcerated or institutionalized and cannot arrange for the care of the minor."

In April of 1990, immediately preceding the permanency planning hearing, Stanley moved to terminate dependency on the grounds that 1) his incarceration was an insufficient basis to sustain the dependency petition and 2) he was not given adequate notice of the basis for the allegations against him. The Court denied the motion on the ground that section 300, subidivision (g) was not operative at the time the court assumed jurisdiction over the minor. Stanley contends the court erroneously denied the motion. We disagree.

We commence our analysis with the general rule that in the absence of a clear legislative intent to the contrary, statutory enactments apply prospectively. (*Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1193-1194.) However, the presumption of prospectivity may be rebutted by a showing that the legislative history or the context of the enactment provides a sufficiently clear indication that the Legislature intended the statute

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...Continued...

no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or who has no parent or guardian actually exercising such care or control."

to operate retrospectively. (*Id.*, at p. 1210.)

Stanley asserts the Legislature's intent that the statute should be retrospective is evidenced by California Rules of Court, rule 1439,[6] the remedial nature of the new statute, and the doubtful constitutionality of former section 300. The assertion must fail for several reasons.

First, it is the Judicial Council, rather than the Legislature, which promulgates rules of court. (*Cal. Const., art. VI, section 6.*) Consequently, the California Rules of Court are not evidence of legislative intent.

Second, the rule applies to dependency petitions which were filed prior to January 1, 1989, but the hearing is not held or completed until *after* January 1, 1989. Cassandra's dependency hearing was conducted prior to that date. Contrary to Stanley's assertion in his reply brief, the Judicial Council was not interpreting the statute; rather it was clarifying transitional procedures for those few cases where petitions were filed prior to, but could not be heard until after, the effective date of the statute. Accordingly, the rule has no application to the instant action.

Finally, the legislative history of Senate Bill No. 243, 1987-1988 Regular Session, indicates the Legislature's intent to make the statute prospective. The Legislative Counsel's Digest to the August 17, 1987, amendment to Senate Bill No. 243 stated: "Existing law, the Arnold-Kennick Juvenile Court Law, details the procedures for declaring a minor to be a dependent child of the juvenile court. Existing law also specifies procedures

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6. This rule reads in pertinent part: "If a petition filed before January 1, 1989, alleges the child is described in section 300 under the subdivision lettering then in effect and petitioner did not make separate allegations under newly revised section 300, and if the jurisdiction hearing is not held or completed until after January 1, 1989, . . ."

All further references to rules are to the California Rules of Court.

pursuant to which a child can be freed from the custody and control of a parent. [ ] This bill would make numerous changes concerning those procedures, including revising the grounds for the declaration of juvenile court dependency on and after July 1, 1988, and January 1, 1990, as specified; ..." However, the Legislative Counsel's Digest to the September 3, 1987, amendment to the bill altered the above-quoted July 1, 1988, date to January 1, 1989. Clearly, this negates a legislative intent to make section 300 retrospective.

Stanley also contends section 300, subdivision (g) applies to this case since the December 1, 1988, jurisdictional finding was not final until the time for filing an appeal had expired after the operative date of the new section 300. The contention is not only contradicted by rule 1439, it fails to recognize that jurisdictional findings are nonappealable. (*section 396; In re Jennifer V.* (1988) 197 Cal. App. 3d 1206, 1209; *In re Tracy Z.* (1987) 195 Cal. App. 3d 107, 112.)

Citing *In re Kelvin M.* (1978) 77 Cal. App. 3d 396, 402, Stanley claims that even under the provisions of former section 300, subdivision (a), the court's assumption of jurisdiction over the minor was void, since the statute requires "'notice *and* an opportunity to be heard.'" The claim is blatantly absurd. Although Stanley was incarcerated at the time of the jurisdictional hearing, he was represented by counsel at the jurisdictional hearing on December 1, 1988. At that time his counsel informed the court that Abigail and Donald could take Cassandra when the health providers permitted the baby to leave the frail care center. There is no factual basis for finding Stanley was deprived of the right to be heard.

Ineffective Assistance of Counsel

Stanley asserts he was denied effective assistance of counsel at the jurisdictional hearing. The thrust of Stanley's claim is that his attorney failed to present evidence and argue the availability of Abigail and Donald to provide care to Cassandra, thus obviating the necessity for the assumption of jurisdiction. He then faults counsel

for failing to request rehearing of the jurisdictional findings and / or filing an appeal. In his petition for a writ of habeas corpus, Stanley renews these assertions and additionally contends that counsel should have been aware of new section 300, subdivision (g).

There is a conflict in California law as to whether parents have a constitutional right to effective assistance of counsel in dependency proceedings. (*In re Jessica Z.* (1990) 225 Cal. App. 3d 1089, 1100; *In re Dawn L.* (1988) 201 Cal. App. 3d 35, 37, comparing *In re Ammanda G.* (1986) 186 Cal. App. 3d 1075, 1079-1080 [right to counsel in section 300 proceedings is statutory, not constitutional; thus ineffective assistance of counsel claim not cognizable] with *In re Christina H.* (1986) 182 Cal. App. 3d 47, 49-50 [due process right].) We need not resolve this conflict, since Stanley's claim is unsupported by fact or law.

Where an ineffective assistance of counsel claim is applied in dependency proceedings, the claimant must show both that counsel's representation fell below an objective standard of reasonableness for prevailing professional norms and that he was prejudiced. (*In re Jessica Z., supra,* 225 Cal. App. 3d at pp. 1100-1101.) Stanley has shown neither.

As previously mentioned, at the dependency hearing, Stanley's counsel informed the court of Stanley's desire that Cassandra be cared for by her aunt and uncle. The charge that counsel should have taken steps to determine independently Cassandra's medical condition and that Abigail and Donald could provide adequate care is mere retrospective rhetoric. Abigail testified that when she saw Cassandra at the hospital and at the home of Evonne Eldridge she was a "very, very sick baby ... and very needy of lots of specialized care and attention." Abigail stated that although she tried to visit at least once every other week, she could not visit more often since she had to take time off from work. This testimony alone evidences the fact that in December of 1988 Abigail was working and was neither capable nor willing to provide full-time care for a sick infant. If this evidence was not already known to Stanley's counsel at the dependency

hearing, it would not have benefited Stanley's case had it been known. With respect to counsel's lack of awareness of the new statute, we conclude that since the statute was only prospective Stanley was not prejudiced. Thus, we find no merit to Stanley's claim of ineffective assistance of counsel and deny the petition for writ of habeas corpus.

Continued Placement with Foster Parents

All family members challenge the denial of the section 388 petition to place Cassandra in the home of Abigail and Donald. Abigail and Donald emphasize constitutional concerns while Stanley stresses the statutory preference for children to be placed with relatives.

Citing such cases as *Stanley v. Illinois* (1972) 405 U.S. 645 and *In re Baby Girl M.* (1984) 37 Cal. 3d 65, Abigail and Donald claim Cassandra and they have a constitutional right to an extended family. They maintain that the rights of a biological family take precedence over those of a state-created foster family.

Stanley and *Baby Girl M.* both concern the rights of unwed fathers. In *Stanley,* the U.S. Supreme Court stated that the biological father's interest in the children he has sired warrants deference and protection. (*Stanley, supra,* 405 U.S. at p. 651.) The court held that all parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. (*Id.,* at p. 658.) In *Baby Girl M.,* our Supreme Court held that in a Civil Code section 7017 proceeding to terminate the parental rights of a biological father, it was error to consider the best intereests of the child without first considering whether an award of custody to the father would be detrimental to the child. (*Baby Girl M., supra,* 37 Cal. 3d at p. 75.) The question with which we are here confronted is whether biological relatives are entitled to the same protection.

We begin our analysis with the observation that both *Stanley* and *Baby Girl M.* have been qualified by subsequent case law and statutes. For instance, in *Lehr v. Robertson* (1983) 463 U.S. 248, the high court held that

due process protection is provided when an unwed father exhibits a desire to commit to the child, not as a result of "the mere existence of a biological link." (*Id.*, at p. 261.) In 1986, the California Legislature amended Civil Code section 7071 with the intent to overrule *Baby Girl M.* (*Adoption of Christopher S.* (1987) 197 Cal. App. 3d 433, 438-439, fn. 4; but see *Jernstad v. McNelis* (1989) 210 Cal. App. 3d 528, 549 ["to the extent that ... *In re Baby Girl M.* rests on federal constitutional considerations it is not subject to being overturned by a legislative enactment"].) Under the new statute the custody rights of an unwed father, not presumed under Civil Code secton 7004, are to be determined by applying the best-interest-of-the-child test.[7] Thus, both federal constitutional law and the California statutory scheme have qualified the rights of natural fathers. These restrictions on the rights of unwed fathers lead to the conclusion that the constitutional rights of mere blood relatives are not as great as those of parents.

Moore v. East Cleveland (1977) 431 U.S. 494 and *Smith v. Organization of Foster Families, supra,* 431 U.S. 816, do not hold otherwise. In *Moore,* a grandmother challenged her criminal conviction under a zoning ordinance which limited occupancy of a dwelling unit to members of a single family. The ordinance defined "family" in such a way as to exclude Moore's grandchild

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7. Civil Code section 7017, subdivision (d)(2) provides in pertinent part: "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall deterimine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed."

Stanley is not a presumed father within the meaning of Civil Code section 7004. Consequently, the standard set in Civil Code section 7017, rather than that in *Baby Girl M.* is applicable to him.

whose parent did not reside in the household. In reversing Moore's conviction, the court noted that decisions concerning child rearing, which are entitled to constitutional protection, have long been shared by relatives. (*Moore, supra,* 431 U.S. at p. 505.) In contrast, in *Smith,* foster parents challenged New York's statutory and regulatory procedures for removal of foster children from foster homes. Although the *Smith* court found it unecessary to determine whether foster parents asserted "liberty"[8] interests within the meaning of the Fourteenth Amendment, it noted the lack of a biological relationship in a foster family, whatever emotional ties may develop in a foster home had their origin in a contractual relation with the state, and any "liberty" interest in a foster parent was in derogation of the parent's "liberty" interest. (*Smith, supra,* 431 U.S. at pp. 838-847.) While the discussions in *Moore, Smith,* and other federal cases cited by appellants may lead to the inference that in particular situations relatives may have certain constitutional protections which are greater than those of foster parents, neither cases relates to the issue before us, *i.e.,* whether relatives have a greater constitutional right to custody of a minor than foster parents.

In determining the "liberty" interest that relatives have in the raising of children we are guided by *In re Albert B., supra,* 215 Cal. App. 3d at p. 377: "While parenting is a fundamental right [citation], minors also have rights. As such, parenting rights are not absolute. The interest of parents in maintaining their relationship with their children must be balanced with the interests of the child in secure and sufficient parenting. [Citation]." In choosing between the rights of parents and those of children, *Baby Girl M.* mandates a showing that parental

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8. Freedom of personal choice in matters of family life is one of the liberties protected by the due process clause of the Fourteenth Amendment. (*Smith, supra,* 431 U.S. at p. 842)

custody would be detrimental to the child before considering the best interest of the minor. However, this mandate dissolves with non-presumed fathers and any relationship other than that of parent and child. In short, a relative's right to raise a child other than his or her own does not rise to the status of a parent's right or the rights of the child. Accordingly, we find that Abigail and Donald have no constitutional claim giving them preferential rights to Cassandra.

Stanley contends the trial court erroneously found that the statutory preference for relative placement contained in sections 281.5[9] and 361.3[10] was no longer applicable and prematurely utilized section 366.25, subi-

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9. Section 281.5 provides: "If a probation officer determines to recommend to the court that a minor alleged to come within Section 300, 601, or 602, or adjudged to come within Section 300, 601, or 602 should be removed from the physical custody of his parent or guardian, the probation officer shall give primary consideration to recommending to the court that the minor be placed with a relative of the minor, if such placement is in the best interests of the minor and will be conducive to reunification of the family."

10. Section 361.3, subidivion (a) provides in relative [(sic)] part: "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative."

division (g)[11] to give preferential consideration to the foster parents' request for placement.

In determining that Joyce and Dave should be the adoptive parents, the court relied on *In re Baby Girl D.* (1989) 208 Cal. App. 3d 1489. In that case the minor was born addicted to heroin. Taken into protective custody at birth, the baby was declared a dependent and placed in a foster-adoptive home. At the permanency planning hearing, the court found that the mother had failed to comply with reunification requirements. Although the minor's maternal great-aunt and uncle requested relative home placement and the social worker's report found that their home was a suitable environment for the minor, the juvenile court directed the county counsel to initiate an action to declare the minor permanently free from the custody and control of her parents and continued placement with the foster parents.

The mother appealed, arguing that her aunt and uncle should have been afforded preferential treatment under sections 281.5 and 361.3. The Court of Appeal affirmed the lower court's ruling for the following reason: "The object of dispositional hearings is to find a temporary caretaker who will meet the child's physical and psychological needs while cooperating in reunification efforts. A relative, who presumably has a broader interest in family unity, is more likely than a stranger to be

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11. Section 366.25, subidivision (g) provides: "Notwithstanding any other provision of law, the application of any person who, as a foster parent, ... has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the foster parent and removal from the foster parent would be seriously detrimental to the child's well-being."

supportive of the parent-child relationship and less likely to develop a conflicting emotional bond with the child. [ ] However, once the juvenile court determines at a permanency planning hearing that reunification is no longer possible and that a child should be freed for adoption, there is no longer any reason to give relatives preferential consideration in placement. The overriding concern at this point is to provide a stable, permanent home in which a child can develop a lasting emotional attachment to his or her caretakers. It is for this reason that in any subsequent decision on adoptive placement, a foster parent to whom the minor already has 'substantial emotional ties' necessarily is entitled to preference over all other candidates. (section 366.25 subd. (g).)" (*Baby Girl D., supra,* 208 Cal. App. 3d at pp. 1493-1494.)

Stanley attempts to distinguish the present case from *Baby Girl D.* by noting that Abigail and Donald are Cassandra's aunt and uncle whereas the relatives in *Baby Girl D.* were the minor's great-aunt and uncle. Additionally, unlike the circumstances in *Baby Girl D.,* Abigail and Donald requested placement in their home at the time Cassandra was born and agreed to adoption prior to the permanent placement hearing. Citing *In re Terry E.* (1986) 180 Cal. App. 3d 932, 946-948, Stanley also maintains the Department of Social Services was at fault for delaying preferential placement with relatives.

Section 366.25, subdivision (g) mandates that once a permanent plan for adoption has been made, the best interest of the minor, which include preference for continuation of existing emotional bonding between the foster parents and the child, prevail. The fact that the Department ot Social Services had the opporunity, at a previous time, to place the minor with relatives becomes irrelevant once the permanent plan of adoption has been made.

DISPOSITION

The order is affirmed. The petitions for writ of

mandate and habeas corpus are denied.

WHITE, P.J.,

We concur:
MERRILL, J.
STRANKMAN, J.*

*Assigned by the Chairperson of the Judicial Counsel.
In re Cassandra M., A049823

App. 2

Supreme Court Filed: December 18, 1991

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
En Banc
ORDER DENYING REVIEW

1st District A049823, Div. 1; S023470

IN RE CASSANDRA M.,
a Person Coming Under the Juvenile Court Law;
_____/

CITY AND COUNTY OF SAN FRANCISCO, et. al.,
Respondents,
v.
STANLEY M., et. al.,
Appellants.
_____/

Petition for review DENIED.

DATED: December 18, 1991

Lucas, C.J.